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No. 96-203

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOYCE B. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed petitioner's perjury conviction under the plain error rule, Fed. R. Crim. P. 52(b), where, although the trial court, without objection, had resolved the issue of materiality itself rather than submitting it to the jury, no reasonable jury could have found petitioner's false testimony to have been immaterial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unreported, but the judgment is noted at 82 F.3d 429 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1996. The petition for rehearing was denied on June 11, 1996 (Pet. App. 10a-11a). The petition for a writ of certiorari was filed on August 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner

was convicted of perjury, in violation of 18 U.S.C. 1623. She was sentenced to 30 months' imprisonment. The court of appeals affirmed. Pet. App. 1a-9a.

1. In the 1980s, Earl James Fields and another man netted approximately $10 million from cocaine trafficking. Pet. App. 2a-3a. In 1993, federal investigators and a federal grand jury sought evidence about the nature of Fields' drug distribution and money laundering activities. See 1 Tr. 163, 183.

On March 25, 1993, petitioner—who had been involved in a long-term relationship with Fields—was called before the grand jury to testify about whether, and to what extent, she had received money from Fields over the years. Petitioner acknowledged that she owned five real properties, including her house, to which she had made improvements. Those improvements raised the house's appraised valuation from $75,600 when petitioner bought it in 1991 to $344,800 in 1993. Petitioner testified that she had received the money for the improvements from a friend of her mother. In fact, however, the money had come from Fields. Petitioner's false testimony about her source of funds formed the basis for her perjury indictment. Pet. App. 3a-4a, 9a.

2. At the close of trial, the district court instructed the jury that, in a perjury prosecution, the element of materiality is a question for the court, rather than the jury, to decide. The court then instructed the jury that petitioner's statements to the grand jury had been material to the grand jury's investigation. Petitioner did not object to those instructions. In fact, when the government had earlier presented evidence at trial concerning materiality, defense counsel had unsuccessfully objected: "Your honor, this is an improper matter for the jury. It goes

to materiality and that's a matter for the Court, and I object." Pet. App. 4a-5a.

3. After petitioner was convicted, this Court held in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), that the Constitution requires submission to the jury of the issue of materiality when it is an element of a charged offense. On appeal, petitioner contended that her conviction should be reversed because the district court had decided the materiality question itself. The court of appeals agreed with petitioner that, under *Gaudin*, the district court had committed error. Because petitioner had not objected to that error at trial, however, the court of appeals reviewed the court's action for plain error under Federal Rule of Criminal Procedure 52(b). Pet. App. 6a.

In conducting its plain error review, the court of appeals assumed that the district court's error was "clear or obvious." Pet. App. 8a; see generally *United States* v. *Olano*, 507 U.S. 725, 734 (1993). The court went on to find, however, that the error did not affect petitioner's "substantial rights," and therefore did not require reversal under Rule 52(b), in light of the "overwhelming evidence" that her false claims were in fact material. The court explained:

> The focus of the grand jury's investigation was the whereabouts of the proceeds from Fields' drug trafficking activities. There was substantial evidence that [petitioner], and specifically her house, was one of the avenues through which Fields laundered that money. No reasonable juror could conclude that [petitioner's] false statements about the source of the money used to purchase and

renovate her house were not material to the grand jury's investigation.

Pet. App. 9a.

DISCUSSION

The Eleventh Circuit correctly held that, because petitioner failed to object at trial, her challenge under *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), is subject to plain error review under Rule 52(b), and that because no reasonable juror could have found her false statement immaterial, her conviction should be affirmed. Nonetheless, that decision conflicts with the Ninth Circuit's recent decision in *United States* v. *Keys*, No. 93-50281, 1996 WL 512389 (Sept. 11, 1996) (en banc), which was decided shortly after the filing of this petition. Because the issues presented in this case and in *Keys* are of recurring importance, this Court's review is warranted.

1. Until the *Keys* decision, every court of appeals to have addressed challenges to convictions under *Gaudin* had determined that plain error review under Rule 52(b) is the appropriate standard for reviewing a district court's failure, in the absence of an objection, to permit the jury to decide the issue of materiality when it is an element of the offense. See, *e.g.*, *United States* v. *David*, 83 F.3d 638, 641 (4th Cir. 1996); *United States* v. *Randazzo*, 80 F.3d 623, 631 & n.4 (1st Cir. 1996); *United States* v. *Ross*, 77 F.3d 1525, 1540-1541 (7th Cir. 1996); *United States* v. *Kramer*, 73 F.3d 1067, 1074 (11th Cir. 1996); see also *United States* v. *Jones*, 21 F.3d 165, 172 (7th Cir. 1994) (Rule 52(b) is "sole source" of appellate authority for reviewing errors to which defendant made no timely objection).

A defendant is not eligible for relief under the plain error rule unless the defendant shows that the

district court committed (1) an "error" (2) that was "plain," "clear," or "obvious" and (3) that affected his "substantial rights." *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993). Even where such a showing is made, however, "Rule 52(b) is permissive, not mandatory." *Id.* at 735. A reviewing court should exercise its "discretion" to reverse a conviction for plain error only "if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (internal quotation marks omitted).

Petitioner contends (Pet. 13) that it is always reversible error for a district court to decide the materiality element of an offense whether or not a defendant makes an appropriate objection at trial. We disagree. Until the Ninth Circuit's recent en banc decision in *Keys*, every court of appeals to have considered the issue after *Gaudin* was decided had held that a district court's failure to submit the materiality issue to the jury does not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings" under the final, discretionary prong of the *Olano* plain error analysis where the evidence of materiality at trial was clear and overwhelming, as in this case.[1] See *United States* v.

[1] Petitioner has never advanced any theory as to how a reasonable juror could have questioned the materiality of her false statements. At petitioner's trial, the federal agent who had interviewed petitioner before her grand jury appearance testified that federal investigators were focusing on Fields' drug trafficking and money laundering activities, see 1 Tr. 163, and the foreperson of the grand jury before which petitioner had appeared testified that the grand jury was also investigating Fields' "drug operation" and "money laundering." 1 Tr. 183-184. Petitioner did not seek to contradict that evidence. And

McGhee, 87 F.3d 184, 186-188 (upholding conviction on plain error review of *Gaudin*-type error), judgment vacated and rehearing en banc granted, No. 95-6323, 1996 WL 552728 (6th Cir. Sept. 19, 1996); *Randazzo*, 80 F.3d at 632 (same); *Ross*, 77 F.3d at 1540-1541 (same); see also *United States* v. *Baumgardner*, 85 F.3d 1305, 1310 (8th Cir. 1996) (reversing conviction on plain error review where "the evidence of materiality was slim"); *David*, 83 F.3d at 647-648 (reversing conviction because, among other considerations, "a jury could conceivably have concluded * * * that materiality was not ultimately proven"); *United States* v. *McGuire*, 79 F.3d 1396, 1404-1405 (reversing conviction because of a "serious factual question regarding the materiality of [defendant's] statements"), rehearing en banc granted, 90 F.3d 107 (5th Cir. 1996); *United States* v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995) (distinguishing between harmless and plain error review of *Gaudin*-type errors), cert. denied, 116 S. Ct. 2529 (1996).

2. In *Keys*, the Ninth Circuit, sitting en banc, departed from that line of authority. The court held that, at the time of the *Keys* defendant's trial (which, like petitioner's trial, predated *Gaudin*), a "solid wall of circuit authority" would have made any objection fruitless, and that plain error review of a *Gaudin*-type error under those circumstances would be "unconscionable." *Keys*, 1996 WL 512389, at *4. Thus, even though the defendant had not objected to the failure to submit materiality to the jury in a perjury prosecution, the court reviewed the conviction "not for plain error, but only for error under Rule 52(a)." *Id.* at *5.

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petitioner has not disputed that her false statements—*i.e.*, that she received over $100,000 in cash from a friend of her mother, and not from Fields, to renovate her house—were clearly material to the grand jury's inquiry into the size, seriousness, and methods of Fields' cocaine operation and the means of laundering its proceeds. See generally *United States* v. *Gaudin*, 115 S. Ct. 2310, 2313 (1995) (describing materiality standard).

The *Keys* court then held that a district court's failure to instruct the jury on the issue of materiality constitutes a "structural" defect requiring reversal of a conviction except where a "review of the facts found by the jury establishes [beyond a reasonable doubt] that the jury necessarily found the omitted element." *Keys*, 1996 WL 512389, at *6 (quoting *Roy* v. *Gomez*, 81 F.3d 863, 867 (9th Cir. 1996) (en banc) (emphasis omitted)); see generally *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993); *Lopez*, 71 F.3d at 960-961. Because the jury's verdict in *Keys* did not logically include a finding of materiality, the Ninth Circuit held that harmless error review under Federal Rule of Criminal Procedure 52(a) was unavailable and that the *Gaudin* error at issue in *Keys* required reversal of the conviction. *Keys*, 1996 WL 512389, at *6-*7. Three judges dissented, observing that the *Keys* decision puts the Ninth Circuit "at odds with eight other circuits," including the Eleventh. *Id.* at *8-*9 (Kleinfeld, J., dissenting) (citing *United States* v. *Kramer*, *supra*).

3. We believe that the plain error standard of Rule 52(b) is applicable to a district court's failure to submit the materiality question to the jury in the absence of a timely objection, whether or not such an objection would be inconsistent with a "solid wall of circuit authority." We therefore believe that a *Gaudin* error does not require reversal of a perjury conviction where, as here, no reasonable juror could

have found a defendant's false statements immaterial.[2] As noted above, that position comports with the decisions of every court of appeals that has considered the issue after *Gaudin*, other than the Ninth Circuit. Nonetheless, the Ninth Circuit has now squarely rejected that position, and that court likely would have reached a different result in this case.[3] Because

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[2] The court of appeals reasoned that *Gaudin* errors that do not cast doubt on "the outcome of the original trial" do not require reversal because they do not affect "substantial rights" for purposes of Rule 52(b). Pet. App. 8a-9a; see also *United States* v. *Kramer*, 73 F.3d 1067, 1074 (11th Cir. 1996). Other courts, by contrast, have held that the reason such errors do not require reversal is that they do not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings" under the discretionary prong of the *Olano* plain error analysis. See cases cited at pp. 5-6, *supra*; see generally *United States* v. *Olano*, 507 U.S. 725, 736 (1993). Either approach would conflict with the Ninth Circuit's rule of automatic reversal for virtually all *Gaudin*-type errors. Review of this case would enable this Court to consider both approaches, as well as the separate issue of whether an "error" that is consistent with established judicial precedent at the time of trial is properly characterized as "plain." See *id.* at 734; *United States* v. *David*, 83 F.3d 638, 641-646 (4th Cir. 1996); *United States* v. *Washington*, 12 F.3d 1128, 1138-1139 (D.C. Cir.), cert. denied, 115 S. Ct. 98 (1994); *United States* v. *Merlos*, 8 F.3d 48, 51 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1635 (1994).

[3] Because petitioner specifically objected at trial to the presentation of evidence to the jury that petitioner believed was relevant only to materiality, see Pet. App. 5a, petitioner's conviction could arguably be upheld on "invited error" grounds that are narrower than the "plain error" analysis actually adopted by the court of appeals. See *id.* at 5a-6a n.1 (declining to decide case on invited error grounds). Nonetheless, in *Keys*, the Ninth Circuit noted that its analysis would have been no different if, as the United States had urged, the court had found that the defendant "invited," rather than simply acquiesced in, the error of which he complained on appeal. See *Keys*, 1996 WL 512389, at *4 n.2. For that reason, even if petitioner could be shown to have "invited" the *Gaudin* error in this case, Ninth Circuit precedent still would have entitled her to a reversal of her conviction.

the issues presented here are recurring and important, the Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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